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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 496th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 6 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 6 (continued)

1. The CHAIRMAN said that, in the absence of any comments, he took it that the Commission wished to adopt paragraphs (3), (4) and (5) as they appeared in the annex to document A/CN.9/371.

2. It was so decided.

3. Mr. KLEIN (Observer for the Inter-American Development Bank), noting that he wished to comment on paragraphs (6) and (7) together, said that paragraph (6) as it stood permitted disqualification for minor errors and precluded the possibility of correcting such errors. With regard to paragraph (7), he believed that the phrase "Except where prequalification proceedings have taken place" should be deleted.

4. He suggested that in paragraph (6) the words "or inaccurate" be deleted and that a sentence reading as follows be added: "Solicitation documents shall permit suppliers or contractors to promptly correct reparable errors or omissions, usually relating to information of a factual or historical nature, required under paragraph (2)." The first part of paragraph (6) would then deal with instances of bad faith, while the second part would permit the correction of mistakes.

5. Mr. TUVAYANOND (Thailand), expressing support for what the Secretariat had proposed in document A/CN.9/377 regarding paragraph (6), suggested that the word "substantially" be inserted before "inaccurate" in that paragraph.

6. Ms. ZIMMERMAN (Canada) proposed that the end of paragraph (6) be amended to read "false, inaccurate or incomplete". Alternatively, if the intention of paragraph (7) was to address situations where the supplier or contractor had not submitted any information at all, she would propose that the end of paragraph (6) be amended to read "was false, inaccurate or, subject to paragraph (7), incomplete".

7. With regard to the suggested insertion of the word "substantially" in paragraph (6), she felt it might cause more problems than it solved.

8. Mr. GRIFFITH (Observer for Australia) felt that the proposed addition of the words "or incomplete" in paragraph (6) was probably unnecessary as incomplete compliance with the requirements of paragraph (2) would automatically mean failure to qualify. However, he would have no objection to the addition if the word "inaccurate" was qualified on the lines suggested by the representative of Thailand, but using the word "materially" rather than "substantially". If "materially" was understood in the same way in both the civil law and the common law setting, the addition of that word would help to ensure that disqualification on unreasonable grounds did not take place.

(Mr. Griffith, Observer for Australia)

9. With regard to the point raised by the observer for the Inter-American Development Bank about the impossibility of correcting minor errors under the terms of paragraph (6), he warned against making it possible to correct intentional errors and thereby encouraging fraud. The possibility of correcting intentionally false, inaccurate or incomplete information should be excluded.

10. Mr. JAMES (United Kingdom) agreed with the observer for Australia that the word "materially" would be better than "substantially".

11. Mr. WALLACE (United States of America), agreeing to the inclusion of the words "or incomplete" and "materially" for the reasons already given, pointed out that the word "materially" was used in subparagraph (2) (b) of article 29.

12. With regard to the warning of the observer for Australia about making it possible to correct intentional errors, he wondered how the procuring entity was to judge the motivation of a supplier or contractor committing an error.

13. Mr. TUVAYANOND (Thailand) suggested inserting the word "materially" in front of "false" and adding "incomplete", so that the phrase read "was materially false, incomplete or inaccurate".

14. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the supplier or contractor should be given the opportunity to submit the information which had inadvertently not already been submitted.

15. Ms. ZIMMERMAN (Canada) said she supported the inclusion of the word "materially" in paragraph (6).

16. With regard to paragraph (7), it was her recollection that the previous draft had referred to "the submission of tenders, proposals or offers". Had the words "proposals or offers" been deleted inadvertently?

17. The CHAIRMAN confirmed that they had and said that the typographical error would be corrected by the Secretariat.

18. Mr. KOMAROV (Russian Federation) supported the inclusion of either "substantially" or "materially" in paragraph (6), there being no significant difference in the Russian language between the two. The inclusion of "incomplete", as proposed by the Canadian delegation, would also be useful.

19. He agreed that the possibility of correcting wrong information should not mean that intentionally false, inaccurate or incomplete information could be corrected. In the case of an intentional error, procuring entities could not but disqualify; they should not have the discretion to do otherwise.

20. Mr. LEVY (Canada), referring to the suggestion made by the representative of Thailand, said he had difficulty in understanding how "materially" could qualify "false", which was an absolute concept. In his view, the concept "false" implied intention, whereas "inaccuracy" implied a mistake. He would prefer the formulation "false or materially inaccurate or incomplete".

21. Mr. PEREZNIETO CASTRO (Mexico) agreed with the representative of Canada that "false" could not be qualified.

22. Mr. GRIFFITH (Observer for Australia) said that, in his understanding, "false" submissions were incorrect submissions made unintentionally. Since he and the representative of Canada - both from common law countries - apparently differed as to the meaning of "false", a reference to intention should perhaps be included.

23. Mr. GRUSSMANN (Austria), drawing attention to the words "at any time" in paragraph (6), said he favoured amending the end of paragraph (6) to read "was false, inaccurate or, subject to paragraph (7), incomplete". False or inaccurate information should at any time be grounds for disqualification, but not incomplete information.

24. Mr. TUVAYANOND (Thailand) said that, if intentionality was implicit in the word "false", perhaps the end of paragraph (6) should read "was false or materially inaccurate or incomplete".

25. Mr. JAMES (United Kingdom) said that a consensus seemed to exist in the Commission and that the matter should now be left to the drafting group which the Commission would no doubt be setting up. The essential point was to distinguish between information which was wrong (whether intentionally or otherwise) and information which was incomplete.

26. He endorsed the remarks just made by the representative of Austria.

27. Mr. SOLIMAN (Egypt) proposed that reference be made in paragraph (7) to previous misconduct, enabling the procuring entity to disqualify a supplier or contractor because of a major breach of contractual obligations in the past.

28. Ms. ZIMMERMAN (Canada) said that, in the light of the discussion, she felt that the end of paragraph (6) should read "was false, materially inaccurate or, subject to paragraph (7), materially incomplete".

29. With regard to the proposal made by the representative of Egypt, perhaps his concern was met by the references in subparagraph (2) (a) to "reliability" and "reputation".

30. Mr. BONELL (Italy) endorsed the remarks just made by the representative of Canada and the remarks made earlier by the representative of Austria.

31. Mr. TUVAYANOND (Thailand) said that, if paragraph (6) was to be amended so that it contained a reference to paragraph (7), the words "for the reason that it has not provided proof that it is qualified pursuant to paragraph (2) of this article" would need to be deleted from paragraph (7), while the words "undertakes to provide such proof" would have to be amended to read "undertakes to rectify the inaccuracy or incompleteness referred to in paragraph (6)".

32. The CHAIRMAN proposed that the final wording of paragraph (7) be left to the drafting group.

33. Mr. TUVAYANOND (Thailand) pointed out that paragraph (7) currently referred to "proof" of the supplier's or contractor's qualifications, which was a separate issue from the inaccuracy or incompleteness of information provided by the supplier or contractor. A supplier or contractor undertaking to rectify the inaccuracy or incompleteness referred to in paragraph (6) should not be excluded from the procurement process.

34. Mr. BONELL (Italy) said he favoured a wording of paragraph (7) along the lines suggested by the representative of Thailand.

35. Mr. AL-NASSER (Saudi Arabia) considered that paragraphs (2) and (6) covered all contingencies and that paragraph (7) should therefore be deleted.

36. Mr. JAMES (United Kingdom) reiterated his view that the matter of wording should now be left to the drafting group.

37. With regard to the remark just made by the representative of Saudi Arabia, he believed that paragraph (7) was important and should be retained.

38. Mr. PHUA (Singapore), agreeing on the need to retain paragraph (7), said that the paragraph dealt with the provision of proof that the requirements of paragraph (2) had been satisfied, whereas the current discussion on the paragraph dealt with a quite different issue - the rectification of the inaccuracy or incompleteness of information. If paragraph (7) was to be amended - a task that, in his view, could be dealt with by the envisaged drafting group - the two issues should be clearly distinguished.

39. Mr. GRIFFITH (Observer for Australia), agreeing that two separate issues were involved, said it might be desirable to break paragraph (7) into two parts. Meanwhile, the drafting group should perhaps be given some guidance on whether, in cases of inadvertence, rectification of the inaccuracy or incompleteness of information was or was not to be permitted.

40. Mr. KOMAROV (Russian Federation) said it was important to provide for such rectification if the inaccuracy or incompleteness was unintentional.

41. Mr. WALLACE (United States of America) said that the point now under discussion had arisen as a result of the addition of the word "incomplete" to paragraph (6). Originally, paragraph (6) had dealt only with questions of falsehood or inaccuracy, and paragraph (7) only with questions of incompleteness. The two sets of questions would have to be disentangled before paragraph (7) could be dealt with by the drafting group.

42. Mr. KLEIN (Inter-American Development Bank) said that his aim in initiating the present discussion had been to ensure that, in situations where prequalification existed, there would be a short period during which the supplier or contractor could correct involuntary errors or omissions, thereby avoiding automatic disqualification. He was not sure whether he had succeeded in achieving that aim.

43. The CHAIRMAN said that in his view the issue was a drafting matter.

44. Mr. TUVAYANOND (Thailand) said that, if it was clear that both questions of falsehood and questions of inaccuracy and incompleteness were now to be dealt with in paragraph (7), he could agree that the matter be referred to the drafting group.

45. Mr. WALLACE (United States of America) said it was important to be clear about the aim of paragraph (7), which appeared to have been inadvertently changed. Originally, the aim had been to allow a supplier or contractor submitting incomplete information to "complete the record"; the aim had not been to allow a supplier or contractor submitting false or inaccurate information to "put the record straight". Acceptance of such a change in the aim of paragraph (7) would amount to a policy decision on the part of the Commission.

46. Mr. PARRA PEREZ (Observer for Venezuela) said that in considering paragraphs (6) and (7) one was dealing with two elements of the responsibility of a potential supplier or contractor - a subjective one and an objective one. The subject element was that of possible guilt on the part of the supplier or contractor submitting false, inaccurate or incomplete information; the objective element was the relevance or importance of the error, inaccuracy or omission. In many administrations, when the authorities noted an error, inaccuracy or omission, they notified the party involved in order that it might put the matter right. Paragraph (7) served that purpose, and it was not concerned with questions of possible guilt.

47. Mr. BONELL (Italy) said he assumed that, with the replacement of "was false or inaccurate" by "was false or materially inaccurate or incomplete", paragraph (6) was acceptable to the Commission. If that assumption was correct, he agreed that the possible reworking of paragraph (7) was simply a drafting matter. If that assumption was wrong, however, the possible reworking of paragraph (7) might involve points of substance.

48. While not wishing to reopen the discussion on paragraph (6), if it was indeed closed, he would like to say that, in his view, while false statements could obviously not be "corrected", there was no difference between correcting incomplete statements and correcting inaccurate statements.

49. Mr. AZZIMAN (Morocco) said that, in his view, the purpose of paragraph (6) was to "penalize" suppliers or contractors submitting false or materially inaccurate or incomplete information, while the original purpose of paragraph (7) was to enable suppliers or contractors to demonstrate that they were qualified to submit tenders. Some speakers, however, apparently wanted paragraph (7) also to serve the purpose of enabling suppliers or contractors to correct inaccuracies in the information submitted by them. As that might lead to contradiction between paragraphs (6) and (7), the Commission should ensure that paragraph (7) served only its original purpose.

50. Mr. AL-NASSER (Saudi Arabia), recalling his earlier remark to the effect that paragraph (7) could be deleted, suggested that in paragraph (6) the words "was false or inaccurate" be replaced by "does not meet all necessary conditions". If that change were made, paragraph (2), which spoke of the right of the procuring entity to require the provision of "such appropriate documentary evidence or other information as it may deem useful", and paragraph (6) would together suffice.

51. Mr. TUVAYANOND (Thailand), stressing the need to provide the drafting group with guidance, said he had no intention of reopening the discussion on paragraph (6).

52. As he saw it, there were at present two issues before the Commission: first, that of precluding abuse of power on the part of the procuring entity, which should not be able to allege that information was false without giving the supplier or contractor an opportunity to rebut the allegation; and secondly, that of enabling the supplier or contractor to rectify the unintentional incompleteness and inaccuracy of information. The issue of precluding abuse of power on the part of the procuring entity would appear to have been resolved by the replacement of "was false or inaccurate" by "was false or materially inaccurate or incomplete" in paragraph (6).

53. Mr. GRUSSMANN (Austria), agreeing with the United States representative's most recent comment, said that the problem now before the Commission might have been caused by the insertion of the word "materially" before both "inaccurate" and "incomplete" in paragraph (6). There should be no possibility of rectifying a material inaccuracy, only of rectifying a formal inaccuracy such as incompleteness. If that point were clear, the rest could perhaps be left to the drafting group.

54. Mr. WALLACE (United States of America) associated himself with the Austrian representative's remarks. With regard to the remarks made by the representative of Saudi Arabia, he felt that paragraph (7) could be a part of paragraph (2).

55. With regard to the issue of precluding abuse of power on the part of the procuring entity, to which the representative of Thailand had referred, he recalled that suppliers or contractors convinced that they had been wrongly excluded had the possibility of recourse under chapter V - Review.

56. If the procurement entity was irresponsible and the procurement process therefore conducted in a poor manner, potential suppliers or contractors would simply stop responding to invitations to tender in the country in question.

57. Mr. KLEIN (Observer for the Inter-American Development Bank) said that all appeared to agree that there could be no correction of errors or omissions when there was bad faith. What he had wished to propose, however, was that, when small errors or omissions had been made without bad faith, suppliers or contractors should be able to correct them even when prequalification proceedings had taken place.

58. Mr. TUVAYANOND (Thailand), responding to the representative of the United States, said that recourse under chapter V against exclusion was a post facto process, whereas paragraph (7) was concerned with the possibility of avoiding exclusion in the first place.

59. He did not think that paragraph (7) could be a part of paragraph (2). In his opinion, paragraph (7) was in its right place - after paragraph (6). The Commission should not try to redraft paragraph (7), but guidelines should be given to the drafting group on how to enable suppliers or contractors to rebut allegations of falsehood and how to enable them to rectify minor errors and shortcomings.

60. Mr. BONELL (Italy), supported by Mr. PEREZNIETO CASTRO (Mexico), said he had the impression that the discussion on paragraph (6), which he had assumed to be closed, was being reopened.

61. The CHAIRMAN said that that was his impression also.

62. Mr. WALLACE (United States of America) said that, if - as he believed was the case - the Commission wished paragraph (6) to end with the words "was false or materially inaccurate or incomplete", it should be clearly understood that "materially" qualified both "inaccurate" and "incomplete".

63. He proposed that paragraph (7) be incorporated into paragraph (2).

64. Mr. GRIFFITH (Observer for Australia) said he believed it to be the Commission's view that, if information was intentionally false or materially inaccurate or incomplete, no opportunity ought to be given to the supplier or contractor to correct it, but that, if information was neither materially false nor materially inaccurate, such an opportunity ought to be provided. If that was the case, he would suggest that the drafting group be asked to draw up an appropriate text on that basis.

65. Mr. TUVAYANOND (Thailand) proposed the following text for inclusion in paragraph (7):

> "The supplier or contractor shall be allowed to provide proof in rebuttal of an allegation of falsehood and to rectify the inaccuracy or incompleteness referred to in paragraph (6) no later than the deadline for the submission of tenders, unless there are reasonable grounds for believing that the supplier or contractor will not be able to do so".

66. Mr. BONELL (Italy) said that, in his opinion, issues like the one addressed in the proposal made by the representative of Thailand should be dealt with elsewhere in the Model Law or through the courts.

67. With regard to the intervention by the observer for Australia, he did not think there was agreement that rectification should not be allowed if information was materially incomplete or inaccurate.

68. Mr. JAMES (United Kingdom), noting that his recollection was the same as that of the Italian representative, said that paragraph (7) in the form adopted by the Working Group contained a generous concession to suppliers and contractors, in that it allowed them to provide information at any time up to the deadline for the submission of tenders.

69. His understanding was that the Commission had agreed to add "incomplete" in paragraph (6) and to make that paragraph subject to paragraph (7), and that it had then agreed that the correction of unintentionally inaccurate information should also be provided for under paragraph (7). That would be consistent with the view taken by the Working Group in the matter of incomplete applications, and he was in favour of such a provision as it would potentially benefit suppliers and contractors without doing any harm to the procuring entity. Paragraph (7) should thus apply to inaccuracies and incompleteness of any kind, whether material or not.

(Mr. James, United Kingdom)

70. With regard to the proposal made by the representative of Thailand, he suggested that the Commission take it up when it came to chapter V.

71. Mr. TUVAYANOND (Thailand) said he could accept that suggestion.

72. With regard to paragraph (6), he felt that it should be possible for suppliers or contractors to challenge disqualification only if they had been disqualified on the grounds of minor inaccuracies or incompleteness; they should be sufficiently competent not to make substantial errors in the information which they provided, and the present text was generous enough in allowing minor errors to be rectified.

73. Mr. KLEIN (Observer for the Inter-American Development Bank) said that, while there appeared to be agreement that suppliers or contractors should be able to correct minor errors up to the deadline for the submission of tenders, he had the impression that the Commission still believed that they should not be able to do so if prequalification proceedings had already taken place. He believed that the fact that such proceedings had already taken place should not debar suppliers or contractors from correcting minor errors up to the tender submission deadline.

74. Mr. PEREZNIETO CASTRO (Mexico) said that he was inclined to favour the position taken by the representatives of Italy and the United Kingdom regarding the proposal made by the representative of Thailand: chapter V already made provision for suppliers or contractors to challenge the allegation that information which they had submitted was false.

75. Mr. WALLACE (United States of America), noting that he also was inclined to favour that position, went on to say that two drafting problems remained: they related to the phrase "at any time" in paragraph (6) and to the fact that the words "false or inaccurate" occurred also in paragraph (8) of article 7.

76. The CHAIRMAN invited members to reflect during the lunch break on the issues raised in the course of the meeting so that a decision could be taken in the afternoon meeting.

The meeting rose at 12.35 p.m.

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SUMMARY RECORD OF THE 497th MEETING

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Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 6 (continued)

1. The CHAIRMAN recalled that two issues in relation to article 6 had remained unresolved at the end of the previous meeting. He was happy to report that the proposal by the observer for the Inter-American Development Bank to delete the words "except where prequalification proceedings have taken place" in article 6 (7) had been withdrawn on the understanding that the idea behind it - namely, that a supplier or contractor should be able to correct information during prequalification proceedings but not later - would be inserted into article 7. Secondly, regarding materially incomplete or inaccurate information, the Australian delegation had agreed to go along with the view that incomplete information could be amended by the supplier or contractor since no tendering had taken place. On that understanding he took it that the Commission wished to adopt paragraphs (6) and (7) of article 6 subject to finalization of the drafting.

2. It was so decided.

Article 7

3. Mr. SAHAYDACHNY (Secretariat) said that the basic purpose of article 7 was to enable procuring entities to engage in prequalification proceedings. The Working Group had considered it important to include that aspect in the Guide to Enactment and in the Model Law mainly because certain procurement proceedings were costly and complex; the procuring entity might wish to examine the tenders only of suppliers or contractors it had established or qualified at the outset. The various paragraphs of article 7 established the principle that the prequalification procedures were essentially subject to the rules set forth in article 6 regarding in particular the criteria a procuring entity was permitted to employ in order to qualify a supplier or contractor. Another important principle was that the criteria used by the procuring entity must be disclosed to applicants for prequalification in the prequalification documents. Article 7 outlined the minimum required contents of prequalification documents, provided for a procedure for requests by applicants for clarification of those documents and contained a rule concerning the circulation of responses to such requests for clarification. It also established a procedure for what was sometimes called "post-qualification", which allowed the procuring entity to recheck and reconfirm the qualification of a supplier or contractor established at an earlier stage of the procurement proceedings, particularly if the initial qualification took place long before the time of the procurement contract and the procuring entity wished to make sure that the information originally submitted remained valid. Finally, he drew attention to the fact that article 7 (8) also referred to "false or inaccurate" information.

4. The CHAIRMAN invited discussion of paragraph (1) of article 7. Observing that there were no comments, he took it that the Commission wished to adopt that paragraph as it stood.

5. It was so decided.

6. The CHAIRMAN, observing that there were no comments on paragraph (2), took it that the Commission wished to adopt that paragraph as it stood.

7. It was so decided.

8. The CHAIRMAN invited discussion of paragraph (3).

9. Ms. ZIMMERMAN (Canada) said that paragraph (3) required the prequalification documents to include the information specified in the invitation to tender under article 19 (1), except subparagraphs (f), (g) and (i). In other words, subparagraph (j) of that article, which required the procuring entity to specify the place and deadline for the submission of tenders, would be incorporated into the paragraph under discussion. The procuring entity, however, might not always be in a position to state the place and deadline for the submission of tenders at the prequalification stage. She therefore suggested that article 19 (1), subparagraph (j), should also be excluded in article 7 (3) or, alternatively, that it should be made clear that the procuring entity's obligation in that regard existed only if the place and deadline for submission of tenders was known at the time. A similar proposal had been made by the Secretariat with respect to article 19 (2). Her delegation had adopted that concept and applied it to the paragraph under discussion.

10. The CHAIRMAN suggested that the matter should be considered during the discussion of article 19.

11. Mr. TUVAYANOND (Thailand) said he was not convinced that subparagraph (j) should also be excepted, since the place and deadline might be very important considerations.

12. Mr. SAHAYDACHNY (Secretariat) said that the issue had been discussed in the Working Group. The idea behind not requiring that information to be included in the invitation to prequalification or in the prequalification documents was that procurement proceedings involving prequalification might well stretch over a long period of time. The procuring entity might not be in a position, at the prequalification stage, to specify a place and deadline for the submission of tenders. As it might be unworkable to require such information in all cases, an alternative solution would be to emphasize the utility of that information and require it only if available or known. In the understanding of the Secretariat, the adoption of its proposal in regard to article 19 (2) would obviate the necessity for the proposed Canadian amendment to article 7 (3).

13. Mr. LEVY (Canada) said that it would be necessary to modify article 19 (1) (j) to refer to the invitation to prequalify as well as to the submission of tenders.

14. Mr. JAMES (United Kingdom) said that it would appear odd to repeat the exceptions both in article 7 and in article 19, and even more odd if the list of exceptions in each case differed, as that would imply an intended distinction. It was a matter that could be examined by the drafting group.

15. The CHAIRMAN said that the drafting group would add that point to its agenda. He took it that the Commission wished to adopt article 7 (3).

16. It was so decided.

17. The CHAIRMAN invited comments on paragraph (4) of article 7.

18. Ms. ZIMMERMAN (Canada) said that paragraph (4) dealt with a procuring entity's obligation to respond to requests for clarification in prequalification documents and that such clarifications provided by the procuring entity must be communicated to all suppliers and contractors provided with prequalification documents. It was, at least in Canada, not common practice to provide details of all clarifications to all parties in the prequalification process, though it was the practice to do so in the tendering process. In Canada a distinction was made since, at the prequalification stage, communicating such information to all contractors might be unnecessary and even costly. Canada therefore proposed that the word "shall" in the eighth line of the paragraph be amended to "may", so that the procuring entity would not be required to communicate such information in every instance.

19. Mr. WALLACE (United States of America) expressed his appreciation for the views put forward by the representative of Canada, but considered that the word "shall" should be retained. One purpose of the Model Law was to lay down the best possible practice. All potential bidders should be treated equally. The point was particularly relevant in regard to chapter V dealing with review: a party considering that it was unjustly refused qualification might challenge the procedure if that procedure was not public and the same for all bidders. To maintain high standards and to facilitate the challenge process, the word "shall" should be retained.

20. Mr. TUVAYANOND (Thailand) shared the concerns of Canada, but suggested a slightly different approach. The word "shall" should be retained, but the text should refer to "any reasonable request" or "for necessary clarification".

21. Mr. MORAN BOVIO (Spain) thought that the text was satisfactory as it stood. Though the Canadian proposal might, at first glance, seem useful, it did not appear to him a good idea to reduce the responsibilities of procuring entities. The Model Law was seeking to establish a minimum standard and it was not appropriate to lower that standard. The word "shall" should be retained. Nor was he in favour of the suggestions made by the representative of Thailand, since introducing a distinction between necessary and unnecessary clarifications might give discretionary powers to the procuring entity that could create problems within the procuring entity and between the procuring entity and contractors or suppliers. It would also be difficult to distinguish satisfactorily between necessary and unnecessary information. He supported the text as it stood since it provided an acceptable standard of requirements for procuring entities, which could bill for the costs involved in providing the information concerned.

22. Mr. TUVAYANOND (Thailand) said that the words "reasonable" or "necessary" were used in many conventions and model laws. It would be easy to establish whether a qualification was necessary or not. However, it was important to retain the word "shall", since suppliers or contractors should be entitled to clarification to facilitate their comprehension of the invitation to tender or prequalification documents.

23. Mr. JAMES (United Kingdom) expressed agreement with the representative of Spain. The words "reasonable" and "necessary" were well-known legal concepts often used in legislation; ultimately, however, they were matters of judgement and, in the United Kingdom, frequently gave rise to litigation when used in legislation. The Working Group had indeed considered whether some qualification of the obligation of the procuring entity to answer requests for information was needed, but had deemed it preferable to require answers to all requests for information since suppliers or contractors not given answers might exercise their rights under the review chapter, and thus delay the procurement process. Canada had accepted the principle elsewhere in the Model Law that, when the tendering process started, clarifications and additional information should be given to all parties. The same principle applied to the prequalification process and would not necessarily involve more expense. He would have to be convinced that there did indeed exist a difference in principle. He considered that the word "shall" should be retained for both the prequalification and the tendering processes.

24. Mr. LEVY (Canada) said that his delegation had raised the point at the behest of Canada's leading government procurement entity. Information and clarifications were far more crucial during tendering than during prequalification. Canada's proposal relied on the good faith of the procuring entities to make the clarifications available to those people to whom it would be of interest. However, acknowledging that there might be many requests for clarification which would only be relevant to those making the request, he suggested as a compromise that the words "if relevant" be inserted before the word "shall", which would make the document more practical and more widely acceptable and help to eliminate unnecessary procedures and costs.

25. Mr. PHUA (Singapore) supported the view expressed by several speakers that paragraph (4) should be retained as it stood. The crux of the matter was not whether the procuring entities could be trusted; the aim was to ensure that no one supplier was given any advantage over any other. To that end the procuring entity could not be allowed to choose whether or not to respond to certain requests for clarification or whether such clarifications should be communicated to all or any suppliers.

26. Mr. TUVAYANOND (Thailand) expressed concern about the cost of responding to "any request" if the provision remained mandatory. If a supplier or contractor requested lengthy information, such as a legal text, which then had to be passed on to every potential supplier, a great deal of expense would be involved.

27. The CHAIRMAN pointed out that the prequalification procedure was tied to article 6 and the information to be supplied under that article was not infinite.

28. Mr. PRIESTLEY (Observer for Australia) said that, if the word "reasonable" was inserted, the question would then be whether the expression "reasonable request" would be interpreted by a court of law as meaning anything other than a reasonable request. Seen from that point of view, Australia could support the clause as it stood on the basis that the difficulties envisaged by Canada would in all probability be met by a reasonable construction of "request" as meaning "reasonable request", should the question ever arise.

29. Mr. WALLACE (United States of America) said it should be remembered in that connection that the Model Law was not exclusive. The Model Law dealt only with what had been defined as public procurement, and it was understood that the normal laws of the land continued. However, for the sake of countries that might have problems, his delegation would have no objection to the addition of the word "reasonable", which was the least harmful of the suggestions.

30. The proposal to insert the word "relevant" was unacceptable, because as indicated by several delegations a different issue was involved: the first sentence concerned the burden on the procuring entity, while the second sentence concerned the fairness and impartiality of the process from the point of view of the bidder. If information was given to one bidder, it should be given to all. In the real world many "simple" inquiries would be made of procuring entities, the replies to which need not be passed on to all bidders. However, as a matter of written principle, the word "shall" should remain.

31. Mr. BONELL (Italy) said that the United States proposal seemed to be a very sound one and urged the Canadian delegation to agree to it.

32. Mr. GRUSSMAN (Austria) supported the United States proposal. The use of the word "reasonable" would mean that the request was relevant to all other suppliers. The question might usefully be considered from the point of view of the review proceedings: if a supplier asked for further information and the procuring entity did not consider the request reasonable, it would not respond and the matter could be submitted to a review procedure; however, if the word "relevant" was inserted, that could mean that other bidders would not be informed of the entity's interpretation and could not therefore seek review.

33. Mr. LEVY (Canada) said that, in view of the comments made and arguments put forward, his delegation would accept the United States proposal.

34. The United States proposal was adopted.

35. Paragraph (4), as amended, was approved.

36. Ms. ZIMMERMAN (Canada), referring to paragraph (5), said that in the second sentence it would be more appropriate to provide that in reaching the decision in question the procuring entity should use only those criteria set forth in the prequalification documents. However, that was a drafting point.

37. The CHAIRMAN said that the matter would be taken care of by the drafting group.

(The Chairman)

38. Paragraph (5) was adopted on that understanding.

39. Paragraphs (6) and (7) were adopted.

40. Ms. ZIMMERMAN (Canada), referring to paragraph (8), said that the reference to prequalification in the context of the second sentence appeared unnecessary, as the point was already covered by article 6 (6).

41. With regard to the reference to false or inaccurate information, her delegation's comment was similar to that made in connection with article 6 - namely, that reference should also be made to incomplete information.

42. The CHAIRMAN said that the Secretariat had noted the point about "incomplete information"; the text should be brought in line with the amendment already adopted to article 6.

43. Mr. TUVAYANOND (Thailand) wondered why the first part of the second sentence used the word "shall". Why could not disqualification be left to the discretion of the procuring entity?

44. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had felt that the provision had to be mandatory. If a supplier or contractor who had previously qualified suddenly failed to qualify because of a change in his circumstances and the information earlier provided was no longer valid, the procuring entity had no choice but to disqualify him because article 6 stated that qualification had to be based on the criteria referred to in that article and disclosed in the solicitation documents.

45. The word "may" had been used in the second part of the sentence to be consistent with article 6 (6), which left it to the discretion of the procuring entity whether or not the submission of false or inaccurate information should result in disqualification.

46. Mr. TUVAYANOND (Thailand) said that he had difficulty in understanding the reference to "reconfirmation".

47. Mr. SAHAYDACHNY (Secretariat) said that, if at an early stage of the procurement proceeding, a given supplier was deemed to have met the qualification criteria disclosed in the solicitation documents, and later on he became the successful supplier, the procuring entity, before entering into a procurement contract with him, might wish to verify that the qualification evaluation made earlier remained valid and might therefore ask him to confirm, but update, the information supplied earlier. The text provided that, if on that second scrutiny, based on the same criteria, the supplier no longer qualified, then disqualification was mandatory.

48. Mr. GRUSSMAN (Austria) said that the first sentence of paragraph (8) seemed to make the basic point clear; perhaps the second sentence could be deleted.

49. Mr. WALLACE (United States of America), referring to the Canadian delegation's comments, said that the reference to prequalification should be retained if the sentence itself were retained; however, the words "at any time" in article 6 (6) should perhaps be deleted.

50. With regard to "reconfirmation", the text was perhaps ambiguous, because failure to reconfirm did not necessarily mean that the supplier was not qualified. He suggested that the sentence should be reworded on the following lines: "The procuring entity shall disqualify any supplier or contractor which the reconfirmation process shows to be unqualified".

51. The CHAIRMAN suggested that, as the problem was not a substantive one, the text should be referred to the drafting group.

52. Paragraph (8) was adopted on that understanding.

Article 8

53. Mr. LEVY (Canada), referring to his Government's comments in document A/CN.9/376/Add.1, said his delegation recognized that, in some situations, a reciprocity requirement was unnecessary and uncalled for. For example, there was no reference to reciprocity in connection with the recognition of foreign arbitral awards in the UNCITRAL Model Law on International Commercial Arbitration, which had been enacted on the premise that it was good for foreign arbitral awards to be recognized in order to facilitate dispute settlement. However, in the present case, it might be asked why a State would enter into an agreement such as the General Agreement on Tariffs and Trade (GATT) or the proposed North American Free Trade Agreement while at the same time giving generally free and open access to procurements to all foreign nationals. Although a reciprocity provision could be contained in regulations, it would be more transparent if article 8 were to be amended and based on reciprocity. His delegation suggested the following wording for the beginning of paragraph (1): "Suppliers and contractors from States that have adopted legislation consistent with the Model Law and, in particular, this article are permitted to participate in procurement proceedings without regard to nationality ..." The aim was to align the Model Law in some respects with the concepts embodied in trade agreements that had been entered into by States.

54. Mr. JAMES (United Kingdom) said that article 8 was an extremely important article and that it had been considered in some depth in the Working Group. The Working Group had concluded that the principles contained in it were the correct ones. The principle of no discrimination based on nationality should be the basic principle for a model law drafted by the United Nations. There were exceptions because it was recognized that there would be circumstances in which enacting States might have in their existing law, or might wish to enact at the same time as the procurement law, provisions to enable the procuring entity to limit participation in certain cases, which should be clearly defined and based on the law of the enacting State.

55. The suggestion made by the representative of Canada would have the effect of destroying the underlying purpose of article 8, namely that suppliers and contractors from any State should normally have the right to participate in procurement. What the Canadian delegation was proposing was very dangerous;

(Mr. James, United Kingdom)

it would represent a step towards protectionism, which would be quite unacceptable to his delegation. He was sure that most delegations wanted to see more free trade and competition, with equality of opportunity for suppliers from developing and developed States. The idea that competition in procurement should be restricted to those who had subscribed to the procurement code was unacceptable and contrary to the purpose of the Model Law which was to encourage free trade. The words of the preamble were very important, particularly paragraph (b). If the Canadian proposal was accepted, one might as well abandon the Model Law.

56. Mr. WALLACE (United States of America) said that his delegation supported the views expressed by the delegation of the United Kingdom. His delegation found it inexplicable that the Canadian delegation could raise such a point at that juncture. The matter had already been raised on many occasions and his delegation had been pleasantly surprised that agreement had been reached on such an open wording in the draft law. The preamble had already been passed, without objection from the Canadian delegation. What was being discussed was not trade policy, but a model law, embodying provision for treaty exception. The commentary on article 8 specifically mentioned treaty arrangements. As a matter of trade policy, the Canadian proposal was profoundly unwise and quite inconsistent with the current policy of Canada and other Governments participating in GATT. If the proposed change were adopted, he would recommend to his Government that it should not agree to the Model Law.

57. Mr. TUVAYANOND (Thailand) wondered why the term "suppliers and contractors" had been used in paragraph (1), rather than "suppliers or contractors", as had been used elsewhere.

58. Secondly, his delegation wondered what Governments were supposed to do in cases of economic sanctions. Would such a case constitute an exception to the rule of non-discrimination or would the suppliers from the target country be eligible to participate in the procurement process?

59. The CHAIRMAN drew attention to the commentary (see document A/CN.9/375) and said that, in the case of a Security Council resolution, the ruling would be binding on all States and contractors from embargoed States should not participate.

60. Mr. TUVAYANOND (Thailand) asked whether it was possible for a country to exclude any applicant for security reasons or for strong political policy reasons.

61. The CHAIRMAN noted that the text allowed an enacting State to insert an exclusion in its own regulations.

62. Mr. GRIFFITH (Observer for Australia) said that it was very much the view of the Australian delegation that the principle set out in paragraph (b) of the preamble should be vindicated as far as possible in finalizing the text. It was, however, necessary to admit the possibility of exceptions, as provided for in paragraph (1) of article 8. The reality was that the Model Law would be adopted only if it admitted the possibility of exceptions to the nationality provision. His delegation thus accepted the Working Group's text,

(Mr. Griffith, Observer for Australia)

but hoped that the Commission would do what it could to support the principle stated in paragraph (b) of the preamble. The commentary, in its final form, could make the general point, with reference to the Preamble in general, paragraph (b) thereof or article 8, that the strong view of the Commission was that, in so far as possible, there should be no discrimination based on nationality. There should also be a statement that the basic view of the Commission was that there should be no discrimination between non-nationals. An enacting State might have a preference for nationals over non-nationals, but there should be no discrimination between non-nationals.

63. As the draft Guide to Enactment (A/CN.9/375) made clear, obligations such as those imposed by the Security Council were allowed for by the text.

64. The CHAIRMAN, with reference to non-discrimination between non-nationals, drew attention to the provisions of paragraph (5) of article 6.

65. Mr. RAO (India) said the provision in article 8 would be undesirable in certain situations, for political reasons. It should be for the procuring entity to determine who should participate, in the light of the principle of reciprocity. Developing countries like India exercised marginal preferences for certain categories of supplier, such as small producers and development corporations. In India, price advantages were given to small producers, and procuring entities gave preference to the public sector, and to home-produced goods bearing an Indian standard. He therefore agreed with the representative of Canada that participation in procurement proceedings under article 8 should be based on reciprocity, giving preference to suppliers, contractors or bidders which had adopted the Model Law.

66. Mr. HAINZL (Austria) said the intention of the Model Law was to avoid discrimination based on nationality. Article 8 was counter-productive, opening the door to all kinds of discrimination. His delegation supported the view that there should be no discrimination on grounds of nationality. If there were any, it should be based on reciprocity, so that all States and legislatures which accepted the Model Law would have to accept bidders from any other country that did the same.

67. Mr. BONELL (Italy) said that the Canadian proposal should be considered on its merits. He did not support it, because the Model Law was not intended to serve the purpose of a law on competition, or an anti-trust law. The ultimate goals stated in the preamble were a form of wishful thinking, and must not be confused with the operative rules, which must be carefully and unambiguously drafted. Article 8 raised controversial economic and political issues. If the Commission's intention was to open the door as far as possible to international competition, article 8 must say so clearly. As presently drafted it was unclear. Its wording would enable States to discriminate on a case-by-case basis, on grounds which would be lawful but need not be stated in advance. Article 17 dealt with the preference, mentioned by the representative of India, for domestic procurement in the case of small entities or contracts. The case contemplated in article 17 (b) should be the main reason for applying the exemption provided for in paragraph (1) of article 8. Both articles must be framed in unambiguous language.

68. Mr. SOLIMAN (Egypt) supported the proposal of the representative of Canada that participation in procurement proceedings should be confined to suppliers from States which had adopted the Model Law. Indeed, a provision along those lines would help to encourage adherence to the Model Law.

69. Mr. MORAN BOVIO (Spain) preferred to retain the existing wording of article 8. Doubts had been expressed about paragraph (1), but they could be dispelled by the commentary on article 8 in the draft Guide to Enactment (A/CN.9/375). Paragraph 1 of the commentary on article 8 explained the reason for the exceptions provided; he drew particular attention in that connection to the last three sentences. There was broad agreement within the Commission on the general principle laid down in article 8 (i), but it could not be implemented immediately because of the international obligations mentioned in the commentary. Those were public commitments, and could not be described as unfair to other States.

70. Mr. WALLACE (United States of America) said the representative of Spain had offered a useful reminder of the historical background to the drafting of article 8. That article represented a compromise achieved over a period of years during which the legal presumption had shifted in favour of international competition. Article 17 likewise represented a compromise, and it was already clear, in article 8, that a State was entirely free under its own law to confine procurement to domestic suppliers. In recent years, the law had moved towards openness and non-discrimination; yet it remained clear, in article 17, that Governments had the right to exclude foreign competition. Where the Model Law was found to be too compact or opaque, guidance should be sought in the commentary, which he felt could be much more explicit. In his own earlier remark referred to by the representative of Italy, what he had meant was that he would recommend that his Government should not agree to the Model Law if the proposal was adopted.

71. The CHAIRMAN said that the discussion turned upon a proposal by the representative of Canada to insert a reciprocity clause into paragraph (1) of article 8. In its present wording, paragraph (1) was felt to be unclear, but as had been pointed out the reason for the exception provided for was stated in the draft Guide to Enactment. If necessary, the Commission could perhaps amend the commentary in the draft Guide.

72. Mr. BONELL (Italy) pointed out that the draft Guide to Enactment emphasized that the exceptions were not to be made "informally or secretly". Article 8 did not attempt to say which suppliers and contractors would be awarded a contract, but rather to state the grounds on which they would be "permitted to participate". Such participation could hardly be secret, nor could a foreign supplier be debarred in secret. Article 8 should emphasize the exceptional character of any exclusions granted on grounds of nationality. In most cases, exclusion would be due to the low value of the procurement, or to international regulations, and such exceptions should be clearly defined. The reference in the draft Guide to secrecy and informality should be deleted, since article 8 was dealing only with admission to procurement procedures. The commentary could perhaps be expanded to reflect the majority view of the Commission, in which case he would support retention of article 8 in its present wording.

73. Mr. HUNJA (Secretariat) said that the Commission appeared to be of the same mind as the Working Group, preferring to leave the text of article 8 as it now was. He noted the misgivings expressed by the representative of India about non-discrimination towards foreign suppliers. In the Working Group, it had been emphasized that States had the right to make any exemptions they wished under the procurement regulations. It was also explained in paragraph 1 of the commentary on article 8 that obligations of enacting States such as those based on regional economic groupings were allowed for. That might also extend to reciprocal arrangements. The commentary should perhaps highlight the point that possible exemptions were not confined to those specifically mentioned in article 8.

74. The CHAIRMAN said he thought that most delegations could live with that approach. He suggested that the Commission should agree that the difficulties mentioned should be taken care of in the commentary.

75. It was so decided.

The meeting rose at 5 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 498th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 7 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 9

1. Mr. SAHAYDACHNY (Secretariat) said that article 9 constituted a generic provision on the required form of communication between the procuring entity and the supplier or contractor. During the preparatory work of the Working Group, a consensus had emerged that the Model Law should facilitate the use of electronic data interchange (EDI), and the Secretariat had initially hoped that article 9 might also serve as an enabling provision in that regard. However, that hope had not been fulfilled.

2. Documents (conference room papers) A/CN.9/XXVI/CRP.2 and CRP.3, which would be available in all languages in due course, contained specific proposals for additional provisions to facilitate the use of EDI.

3. As it stood, paragraph (1) set forth a requirement that communications must be in a form that provided a record - not necessarily written - of their content; it also stipulated that that form was subject to other provisions of the law. The only provision in the existing text of the Model Law that conflicted with article 9 was the one in article 25 (5), which required that tenders be submitted in writing and in a sealed envelope. The implications of the decision of the Working Group with regard to article 25 (5) could be considered in greater detail during discussion of the proposals contained in documents A/CN.9/XXVI/CRP.2 and CRP.3.

4. He drew attention to a typographical error in the text of paragraph (2): the reference to article 11 (3) should be replaced by a reference to article 18 (3). In addition, the Commission might wish to consider the wisdom of retaining the reference, in the same paragraph, to article 32 (1), since the Model Law would then permit acceptance of a tender to be communicated initially by telephone.

5. Mr. HERRMANN (Secretary of the Commission) said that the key phrase in the wording of article 9 (1) was "a form that provides a record of the content of the communication". There was general agreement that the substantively identical wordings used in other model laws, such as the Model Law on International Commercial Arbitration, should be interpreted as applying to EDI and that only purely oral communications, whether direct or by telephone, were excluded. He urged the Commission, in the interests of consistency, to consider the proposed wording of article 9 (1) in the light of that interpretation.

6. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he had difficulty in understanding the first paragraph of article 9 and would therefore submit his own proposed version of that paragraph to the drafting group.

7. Mr. LEVY (Canada) said that his delegation's proposals (contained in document A/CN.9/XXVI/CRP.3) for amending articles 9 (1) and 25 (5) so as to provide for the use of EDI were based on an interpretation that fully coincided with the interpretation just referred to by the Secretary of the Commission.

8. Noting that the United States delegation was also submitting a proposal relating to EDI, he said that the Canadian delegation was not wedded to any particular form of words in its endeavour to secure the end that both delegations desired. The overriding concern was to ensure that, where EDI was available, its use should be permitted and that, where it was not available, its absence should not constitute an impediment to submitting or receiving tenders.

9. Mr. WALLACE (United States of America), noting that, like the delegation of Canada, his delegation was not wedded to any particular form of words, said that many countries currently lacked EDI facilities and that, given the difficulties associated with issues such as confidentiality and authenticity, caution would have to be exercised if conversion of the procurement process from a paper-based to an electronics-based system was envisaged.

10. Perhaps the Commission should request the Secretariat to prepare a paper on EDI as applied to procurement, for consideration by the Commission at its next session along with the question of the procurement of services. In the paper, the Secretariat might address such questions as how to ensure confidentiality, how to solve problems of authentication, how to educate people in the workings of EDI in the procurement field and how to convince legislatures that the risks involved in the use of EDI were not too great.

11. Mr. ANDERSEN (Denmark), expressing strong support for the principle underlying article 9, said that the Commission, which should stick to the conclusion that it had reached some years before about the legal value of computer records, should ensure that the principle was not undermined.

12. Many problems associated with matters such as confidentiality and authentication would undoubtedly be resolved by technical means or by legislation other than laws based on the Model Law. He accordingly wished to endorse article 9 as it stood and to caution against raising problems that could be resolved in the practical world.

13. The CHAIRMAN proposed that the discussion on article 9 be suspended until documents A/CN.9/XXVI/CRP.2 and CRP.3 were available in all of the Commission's working languages.

Article 10

14. Mr. SAHAYDACHNY (Secretariat) said that earlier versions of the article had spelled out detailed requirements, the aim being to harmonize the relevant legalization laws of different States. Ultimately, however, the Working Group had decided that it should not attempt to harmonize such laws, but rather to ensure that they were not used for stifling competition, in particular through discrimination against foreign suppliers and contractors, and it had agreed on the principle that no legalization requirements should be imposed in procurement proceedings that were not imposed for the same types of documents in a general context.

15. Mr. WALLACE (United States of America) said he found article 10 entirely satisfactory.

16. Mr. KOMAROV (Russian Federation) said that there were international treaties which established simpler requirements for the legalization of documentary evidence than those established by the national legislation of many States. Perhaps one should provide in article 10 for legalization requirements to be determined not only by the legislation of a given State but also by relevant international treaties.

17. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 10 was an excellent means for precluding the imposition of excessive legalization requirements, but should also contain a provision enabling suppliers or contractors (especially those awarded contracts) to correct defects of form which were relevant from the point of view of legalization. Some might think that the point was implicitly covered by article 6 (7), but he believed it should be covered explicitly in article 10.

18. Mr. JAMES (United Kingdom) considered that the best place to cover the point raised by the observer for the Inter-American Development Bank was in the Guide to Enactment.

19. Regarding the important point raised by the representative of the Russian Federation, if the laws of a State reflected that State's obligations pursuant to an international treaty, the legalization requirements in that State would differ from those in a State not party to that treaty. The point was probably one of interpretation and could also be dealt with in the Guide to Enactment.

20. Mr. MORAN BOVIO (Spain) agreed with the representative of the United Kingdom that the points raised by the representative of the Russian Federation and the observer for the Inter-American Development Bank could be covered in the Guide to Enactment.

21. Mr. TUVAYANOND (Thailand), noting that article 10 referred to "the laws of this State", said that there were sometimes regulations and practices not specified in the laws of a State and that it might be necessary to add the word "regulations" to the word "laws".

22. The point raised by the representative of the Russian Federation was not, in his opinion, simply one of interpretation. Perhaps the wording of article 10 should take that point into account.

23. Mr. PEREZNIETO CASTRO (Mexico) suggested that the Guide to Enactment mention the international (including inter-American) treaties concerning the legalization of documentary evidence.

24. Mr. WALLACE (United States of America), noting that the question of international treaty obligations was covered in article 3, said that the drafting group should perhaps consider the point raised by the representative of the Russian Federation - and also the point raised by the representative of Thailand.

25. Mr. LEVY (Canada) said, with regard to the point raised by the representative of Thailand, that article 10 referred to requirements "provided for in the laws of this State" and that, as far as he was concerned, laws included regulations. He did not think that article 10 as it stood would give rise to any problems in common law jurisdiction, and probably not in civil law jurisdiction either. Besides, references to regulations in conjunction with laws in some cases and not in others might lead to problems of interpretation.

26. The representative of Thailand had also referred to "practices". As practices sometimes arose independently of the law, he would prefer it if there were no reference to practices in article 10.

27. With regard to the point raised by the representative of the Russian Federation, if a State became party to an international treaty, its laws should be brought into conformity with it. If they were not, that State was in breach of its international treaty obligations. The Model Law should be based on the assumption that the laws of the State were in conformity with such obligations.

28. Mr. TUVAYANOND (Thailand), noting that he hoped the drafting group would consider the point raised by him, said that the Model Law should reflect the fact that some countries, especially developing countries, implemented international treaty obligations without any implementing legislation - on the basis of practices. Unless the Model Law reflected that fact, such countries might find it difficult to enact it.

29. Mr. KOMAROV (Russian Federation) said that, after listening to the discussion, he was more convinced than ever that the point which he had raised should be covered - either in the Guide to Enactment or in the Model Law itself. A situation could arise where suppliers or contractors based in countries parties to international treaties providing for more lenient legalization requirements had an advantage over suppliers or contractors based in other countries and hence subject to more stringent requirements.

30. Mr. HERRMANN (Secretary of the Commission) said that, as he understood it, the representative of the Russian Federation had raised an important question - namely, should the Model Law ensure that there was no discrimination between tenders from suppliers or contractors based in countries which had acceded to treaties providing for less stringent legalization requirements and tenders from suppliers or contractors based in countries not bound by such treaties? That question was a complex one which could not be dealt with simply by inserting a remark in the Guide to Enactment.

31. Mr. KOMAROV (Russian Federation) said that the understanding of the Secretary of the Commission was correct.

32. Mr. RAO (India), recalling the Canadian representative's remark that, as far as he was concerned, laws included regulations, said that was not necessarily the case in his own country, where administrative regulations did not have the character of law. He therefore felt that explicit reference should be made to regulations in article 10.

33. Mr. PEREZNIETO CASTRO (Mexico) said that the discussion gave the impression that the Commission was developing an international treaty rather than a model law. He failed to see where the difficulties - if any - lay.

34. THE CHAIRMAN said the Commission had to decide whether to make provision in article 10 for equal treatment as between suppliers or contractors based in States with lenient legalization procedures and suppliers or contractors based in other States. Speaking in his personal capacity, he would suggest that article 10 not be amended for that purpose.

35. With regard to the question of regulations, he felt it should be dealt with in the Guide to Enactment.

36. Mr. LEVY (Canada), agreeing with the Chairman's remarks concerning the question of regulations, said that, in his opinion, the Commission should not try to eliminate differences arising from international treaties; it might otherwise be seen as acting presumptiously, and the endeavour might give rise to difficulties. He believed that article 10 should be left unchanged.

37. Mr. WALLACE (United States of America) supported that view, but agreed with the Secretary that the representative of the Russian Federation had raised an important question; the existence of international treaty obligations might well lead to discrimination in favour of certain suppliers or contractors, which would conflict with one of the main objectives of the Model Law. The attention of legislators should be drawn to the question in the Guide to Enactment.

38. The CHAIRMAN said he took it to be the wish of the Commission to include in the Guide to Enactment a statement to the effect that, where laws were mentioned, regulations were also implied and also a statement drawing attention to the question just referred to; article 10 could then be adopted unchanged.

39. It was so decided.

Article 11

40. Mr. HERRMANN (Secretary of the Commission), drawing attention to amendments proposed by the Secretariat in document A/CN.9/377, said the purpose of the article was to establish the requirement that the procuring entity prepare and maintain a record of all major actions and decisions taken in the course of the procurement proceedings. The Working Group had regarded that requirement as one of the main pillars of the type of procurement system envisaged under the Model Law and as an essential element in trying to ensure transparency and the accountability of the procurement entity to taxpayers, administrative oversight bodies and legislatures.

41. The Working Group had thought it useful, for purposes of clarity, to list under a single heading all the kinds of information that should be contained in the record - even those which were already referred to in other parts of the text.

(Mr. Herrmann, Secretary of the Commission)

42. Paragraphs (2) and (3) of the article dealt with the question of the extent to which the record should be made available for examination, to whom and when. The Working Group's view had been that it would not be appropriate for the Model Law to provide for complete disclosure of the record to anyone on request, as provided for in some States by freedom of information acts, but rather that the Model Law should provide for disclosure to the extent necessary if the record was to fulfil its function of ensuring transparency and the right of aggrieved suppliers and contractors to seek review.

43. The Working Group had thought it important that a portion of the record should be available for examination by suppliers and contractors so that they could find out whether they had been treated fairly or whether they had grounds for seeking review, and provision for such examination was made in paragraph (3). Of course, the provisions regarding disclosure could be overriden by the orders of a competent court.

44. Lastly, the article provided that failure by the procuring entity to prepare a record would not give rise to liability for monetary damages.

45. Ms. ZIMMERMAN (Canada), referring to her Government's comments in document A/CN.9/376/Add.1, said that in some countries the procuring entity acted on behalf of client departments which prepared the record, which was then maintained by the procuring entity. In order to accommodate that situation, she suggested that the word "maintain" be substituted for "prepare" in the first line of paragraph (1).

46. With regard to subparagraph (1) (k), she suggested that the drafting group consider replacing the word "grounds" by the phrase "grounds and circumstances", which had been used in other contexts.

47. Mr. KLEIN (Observer for the Inter-American Development Bank) pointed out that countries might wish to add other kinds of information to those listed in paragraph (1). He therefore suggested that the words "at least" be inserted after the word "containing" in the second line.

48. Mr. WALLACE (United States of America) endorsed the last two suggestions.

49. Mr. JAMES (United Kingdom) supported the replacement of "grounds" by "grounds and circumstances" in subparagraph (1) (k).

50. The CHAIRMAN said he took it that the Commission wished to replace the word "grounds" by the phrase "grounds and circumstances" in subparagraph (1) (k).

51. It was so decided.

52. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. KLEIN (Observer for the Inter-American Development Bank), suggested that, rather than substituting "maintain" for "prepare" at the beginning of paragraph (1), the Commission use both words, so that the paragraph would read "prepare and maintain".

53. Ms. ZIMMERMAN (Canada) said that the suggestion made by the representative of Mexico would not meet her delegation's concerns.

54. Mr. TUVAYANOND (Thailand) suggested that "prepare" be replaced by "keep" rather than "maintain".

55. Mr. JAMES (United Kingdom), supporting that suggestion, said that the matter should perhaps be referred to the drafting group.

56. Mr. RAO (India) said that the essential question was not who prepared and maintained the record, but accessibility of the record for suppliers and contractors. Their interests required simply that the record be maintained.

57. The CHAIRMAN said he took it that the Commission wished to delete the word "prepare" in the first line of paragraph (1) and replace it by "maintain" or "keep", the choice being left to the drafting group.

58. It was so decided.

59. Mr. MORAN BOVIO (Spain) supported the idea - put forward by the Observer for the Inter-American Development Bank - that the words "at least" should be inserted after the word "containing" and said that their insertion would underline the fact that one was thinking in terms of minimum requirements.

60. Mr. PEREZNIETO CASTRO (Mexico), also supporting the idea, said that one should not view the Model Law in general as setting minimum requirements. The important thing was uniformity and harmonization, with potential suppliers or contractors participating in procurement proceedings on the basis of certainty that there were no requirements over and above those laid down in the Model Law.

61. The CHAIRMAN said he took it that the Commission wished to adopt the amendment suggested by the observer for the Inter-American Development Bank.

62. It was so decided.

63. The CHAIRMAN invited the Commission to consider the proposal by the Secretariat, made in document A/CN.9/377, that the required content of the record also include a summary of requests for clarifications and of the corresponding clarifications. If the proposal was acceptable, a subparagraph (1) could be added to article 11 (1).

64. Mr. SAHAYDACHNY (Secretariat) explained that such a summary was needed so that suppliers or contractors could discover whether or not they had received responses to requests for clarification made by other suppliers or contractors - in other words, whether or not the procuring entity had complied with the requirement to circulate such responses.

65. Mr. TUVAYANOND (Thailand) said that, in his opinion, the matter was already dealt with in paragraph (4) of article 7.

66. Mr. SAHAYDACHNY (Secretariat) said that the purpose of the Secretariat's proposal was to provide a backstop to paragraph (4) of article 7.

67. Mr. WALLACE (United States of America) commended the proposal in principle, but said that, since the procurement process was often very long and could involve very many requests for clarifications, there was a need to specify exactly what kinds of information should be covered in the summary.

68. Mr. LEVY (Canada) suggested that the scope of the summary could be made clear by referring in additional subparagraph (1) to paragraph (4) of article 7 and to article 23.

69. Mr. TUVAYANOND (Thailand) pointed out that in two places in article 11 (1) the phrase "suppliers and contractors" was used, but elsewhere the reference was generally to "suppliers or contractors". Was that intentional, and if so what was the rationale?

70. The CHAIRMAN suggested that the question be referred to the drafting group and said he took it that the Commission wished to adopt the Secretariat's proposal for an additional subparagraph (subparagraph (1)), with the references suggested by the representative of Canada.

71. It was so decided.

72. The CHAIRMAN took it that the Commission wished to adopt article 11 (1) as amended.

73. It was so decided.

74. The CHAIRMAN said he took it that the Commission wished to adopt article 11 (2) as submitted by the Working Group in the annex to document A/CN.9/371.

75. It was so decided.

76. The CHAIRMAN invited the Commission to consider article 11 (3).

77. Mr. SAHAYDACHNY (Secretariat) drew the attention of the Commission to the two amendments to article 11 (3) proposed by the Secretariat in document A/CN.9/377, where the reference to article 11 (3) (f) and (g) should read article 11 (1) (f) and (g).

78. Ms. ZIMMERMAN (Canada) had no difficulties with the proposed amendments, but suggested that "other than" would be preferable to "beyond"; perhaps the drafting group could consider the matter.

79. Also, referring to the comments of her Government in document A/CN.9/376/Add.1, she proposed that paragraph (3) provide that relevant portions of records be made available "to" rather than "for inspection by" suppliers and subcontractors.

80. Mr. TUVAYANOND (Thailand), referring to the words "the procuring entity shall not disclose", asked why there should be an obligation - rather than a right - not to disclose information of the kind referred to in subparagraphs (3) (a) and (b). Also, he wondered whether the paragraph should not include provisions regarding non-disclosure on national security grounds.

(Mr. Tuvayanond, Thailand)

In addition, he wondered whether there might not be contradiction between subparagraph (3) (b), concerning information that should not be disclosed, and subparagraph (1) (e), concerning information that should be included in the record of the procurement proceedings.

The meeting rose at 12.35 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 499th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 7 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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This record is subject to correction.

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 11 (continued)

1. Ms. ZIMMERMAN (Canada) said that, after informal consultations during the lunch break, her delegation wished to withdraw its proposal that the words "for inspection by" be replaced by the word "to" in paragraph (3).

2. Mr. WALLACE (United States of America) said his delegation had considered the Canadian proposal to have merit and would have liked the same change to be made in paragraph (2) of article 11 as well. As they stood, paragraphs (2) and (3) were unnecessarily limiting.

3. Mr. JAMES (United Kingdom), having expressed support for the remarks just made by the representative of the United States of America, said that he had misgivings about the written comments of the Canadian Government, where there was reference to the "debriefing" of bidders. The Model Law should provide for at least the inspection of the relevant portions of records.

4. Recalling that during the previous meeting it had been agreed that a subparagraph (1) should be added to paragraph (1), he said that a reference to that subparagraph would presumably also have to be included in paragraph (3).

5. Regarding the question of the representative of Thailand about non-disclosure on national security grounds, the point was probably covered by the phrase "would not be in the public interest" in subparagraph (3) (a). With regard to the phrase "shall not disclose", he felt that non-disclosure on the grounds that disclosure would be contrary to law, would impede law enforcement or would not be in the public interest might be dealt with in general legislation regarding confidentiality, but that non-disclosure on the grounds that disclosure would prejudice legitimate commercial interests of the parties or would inhibit fair competition and non-disclosure of information of the kind to which subparagraph (3) (b) related should be covered by legislation on procurement. At all events, as far as those two questions were concerned, he felt that paragraph (3) should remain unchanged.

6. Mr. WALLACE (United States of America), endorsing the remarks of the representative of the United Kingdom regarding the phrase "shall not disclose", said it was important that the provision remain in a mandatory form, in order to maintain both confidentiality and the integrity of the procurement process. Perhaps a comment could be included in the Guide to Enactment.

7. Mr. BONELL (Italy) expressed agreement with the representatives of the United Kingdom and the United States of America.

8. The CHAIRMAN said he took it that the Commission wished to retain the word "shall" in paragraph (3).

9. It was so decided.

10. The CHAIRMAN invited the Commission to consider the two proposals made by the Secretariat. The first one was to end the first sentence of paragraph (3) after "procurement contract" and to have a second sentence reading "Disclosure of the portion of the record referred to in subparagraphs (c) to (e) may be ordered by a competent court." The second one was to add the phrase "beyond the summary referred to in subparagraph (1) (e)" at the end of subparagraph (3) (b).

11. He took it that the Commission wished to approve those proposals.

12. It was so decided.

13. Mr. RAO (India) suggested that the words "for inspection by" be replaced by the words "on request to".

14. Mr. BONELL (Italy) said he had no objection to that suggestion, although he had assumed that portions of records would be made available only on request.

15. Mr. WALLACE (United States of America) said that he would prefer the text to read "made available for inspection or otherwise", but could go along with the suggestion made by the representative of India.

16. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. TUVAYANOND (Thailand), pointed out that paragraph (2) talked of making portions of records available "for inspection by any person", whereas paragraph (3) talked of making them available "for inspection by suppliers or contractors" only. Recalling what the representative of the United States of America had said a little earlier about paragraph (2), he said that, in his opinion, it was in order to hand over portions of records to suppliers or contractors, in order that they might compare and check figures, but not to persons other than suppliers or contractors.

17. The CHAIRMAN said that, as he saw it, the purpose of article 11 was to promote accountability and transparency. The procuring entity was under an obligation to keep records so that suppliers and contractors could seek meaningful review if the need arose. At the same time, the Model Law established two types of disclosure, one for the public at large and the other for contractors and suppliers if they so demanded. In a situation where the procuring entity was requested by a contractor or supplier to make a disclosure, the level of disclosure need not go beyond the summary. On the other hand, a situation was foreseen in the Model Law in which, even if a contractor or supplier made a request, no disclosure need be made save on the orders of a court. The balance achieved by the Model Law was a good one, taking care of the interests of the procuring entity and of contractors and suppliers.

(The Chairman)

18. He took it that the Commission wished to approve the replacement of the words "for inspection by" by the words "on request to" in paragraph (3).

19. It was so agreed.

20. It was further agreed that the same amendment should be made in paragraph (2).

21. Mr. BONELL (Italy) suggested that the phrase "for monetary damages solely as a result of failure" in paragraph (4) be replaced by "for damages due to failure", which was the more usual wording in such cases.

22. Mr. TUVAYANOND (Thailand) said that the word "prepare" should be replaced by the word "keep" in order to be consistent with what had been decided regarding paragraph (1).

23. Mr. GRIFFITH (Observer for Australia) wondered whether it was necessary to mention "damages"; the paragraph could perhaps read "The procuring entity shall not be liable to contractors and suppliers because of failure ...".

24. Mr. SAHAYDACHNY (Secretariat) said that, as he recalled it, the Working Group had felt that mere omissions from the record, which would be unintentional in most cases, should not give rise to monetary damages, but it had not wished to preclude the possibility of injunctive or other forms of relief.

25. Mr. BONELL (Italy) said that, in spite of that explanation, he would still like to see the deletion of the word "monetary".

26. Mr. WALLACE (United States of America) said he supported the suggestion made by the representative of Italy.

27. Mr. LEVY (Canada), supporting the suggestion made by the Italian representative, said that paragraph (4) would then presumably read "The procuring entity shall not be liable to contractors and suppliers for damages due to failure to keep a record ...".

28. It was his recollection that, when that paragraph had been discussed in the Working Group, the need had been felt to balance the necessity for record-keeping against ensuring that there was no penalty for a procuring entity that failed to carry out what was basically an administrative task. It had therefore been decided that there would be a requirement for the procuring entity to keep a record but, in the event of failure to do so, suppliers and contractors would not be able to sue it for damages. The assumption was that the procuring entity would also be subject to the general laws of the country and that such matters could be dealt with in other ways.

29. The observer for Australia had talked about deletion of the word "damages". However, use of the words "shall not be liable to contractors and suppliers" would remove the requirement for injunctive relief, which some delegations considered to be necessary.

30. Mr. PEREZNIETO CASTRO (Mexico), having expressed support for the suggestion made by the representative of Italy, said that use of the word "liable" in the English version of paragraph (4) suggested that the common law view had predominated during the drafting of that paragraph; in civil law systems, the focus was on "responsibility", which was not quite the same thing as "liability". In the Spanish version, the word "deberá" was used, with no reference to either responsibility or liability.

31. In response to the comment of the Canadian representative regarding injunctive relief, he said that most civil law systems did not have injunctions.

32. Mr. JAMES (United Kingdom) said that it had been agreed in the Working Group that there would be no liability for damages, but there would be liability either for injunctive relief or for administrative law action. It was crucial to retain the idea of liability for damages, although it was not necessary to specify "monetary" damages.

33. Mr. GRIFFITH (Observer for Australia) withdrew his suggestion that the reference to "damages" be deleted.

34. Mr. KLEIN (Observer for the Inter-American Development Bank) said he did not see why a procuring entity that was incapable of keeping records should not pay damages to a supplier or contractor for its failure to comply with such an essential requirement. He would prefer it if paragraph (4) were deleted.

35. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had been concerned that a simple reference to exclusion of liability might be taken to exclude all forms of relief. That was why the word "monetary" had been inserted.

36. The CHAIRMAN called on the Commission to adopt paragraph (4) amended to read "The procuring entity shall not be liable to contractors and suppliers for damages due to failure to keep a record ...".

37. It was so decided.

Article 12

38. Ms. ZIMMERMAN (Canada), referring to document A/CN.9/376/Add.1, said that, as it was currently worded, article 12 did not catch inducements offered through an agent of a supplier or contractor. To correct that, her delegation suggested the insertion of the words "directly or indirectly" in the third line after "submitted it". The present wording referred only to any "current or former officer or employee of the procuring entity". In order to broaden the scope of the provision, her delegation suggested the addition, in the fourth line, of the words "State or the" before "procuring entity". If the Commission were prepared to accept that proposal, it would also be necessary to refer to "the State or the procuring entity" in the seventh line.

39. Mr. SOLIMAN (Egypt) asked whether it was necessary to provide for cases where officers or employees of the procuring entity refrained from performing certain acts.

40. Ms. ZIMMERMAN (Canada) said she thought that cases of omission - as well as of commission - should be covered. Perhaps the reference to "decision" in the seventh line of article 12 covered both.

41. Mr. TUVAYANOND (Thailand), supporting the inclusion of the words "directly or indirectly", said he had doubts about the wisdom of inserting a reference to the State; it would be necessary, for the sake of consistency, to insert such references throughout the Model Law as the procuring entity acted on behalf of the State. In international forums, the bona fides of States was normally presumed.

42. He agreed with the Canadian view that the reference to "decision" covered cases of commission and omission.

43. In place of "a gratuity, whether or not in the form of money", he suggested the words "a gratuity or benefit in any form".

44. Mr. LEVY (Canada) said that, in suggesting the inclusion of a reference to the State, his delegation did not wish to cast doubt on the bona fides of any State. It was concerned about inducements offered to high officials of the State who were not employed by the procuring entity but were in a position to exercise influence.

45. Mr. WALLACE (United States of America) suggested that the final sentence begin with the words "Such rejection" rather than "The rejection".

46. Mr. RAO (India) expressed support for the amendments proposed by Canada, including the proposed insertion of a reference to the State.

47. Mr. MORAN BOVIO (Spain) also expressed support for the insertion of such a reference.

48. Mr. TUVAYANOND (Thailand) suggested that a reference to "relevant authorities" might be preferable.

49. Mr. WALLACE (United States of America) suggested the phrase "of the procuring entity or other governmental authority"; there were several references to "governmental authority" in the Model Law.

50. Mr. TUVAYANOND (Thailand) agreed.

51. Mr. LEVY (Canada) said that, if the words "the State or" were inserted, it should be made clear that the "officer or employee" was an officer or employee of the Government of the State or of the procuring entity - certainly not the constitutional head of State.

52. Mr. BONELL (Italy) suggested the phrase "of the procuring entity or any other relevant authority".

53. Mr. NICOLAE-VASILE (Observer for Romania) proposed the insertion, after the word "if", of the phrase "evidence is furnished that".

54. The CHAIRMAN suggested that the proposal made by the observer for Romania be reflected in the Guide to Enactment. On the basis of the discussion so far, article 12 might read as follows:

> "(Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it directly or indirectly offers, gives or agrees to give to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity or other governmental authority in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor."

55. The wording read out by the Chairman was adopted.

56. Mr. HERRMANN (Secretary of the Commission) said that insertion of the phrase "directly or indirectly" had often been proposed in the past in order to cover situations where an agent might be involved, but the Commission had always decided against inserting it so as to avoid its frequent repetition. Use of the phrase in article 12 should be regarded as exceptional, and it must not prompt the conclusion that references elsewhere in the text to acts of the procurement entity excluded acts of an agent.

57. The CHAIRMAN proposed that the Commission defer consideration of article 9 until documents A/CN.9/XXVI/CRP.2 and 3 had been available for some time in all of the Commission's working languages and that the Commission now take up chapter II of the Model Law.

Article 13

58. Ms. PIAGGI-VANOSSI (Argentina) suggested that the title of article 13 be changed from "Methods of procurement" to "Selection procedures".

59. The CHAIRMAN said that the matter appeared to be purely one of drafting.

60. Mr. TUVAYANOND (Thailand) said that paragraph (13) (1) appeared to limit the freedom of Governments in certain fields, such as national security, and suggested that consideration of that paragraph be postponed until various articles later in chapter II had been discussed.

61. Mr. HUNJA (Chairman of the Working Group) said that paragraph (13) (1) contained one of the most important provisions of the draft Model Law. Before discussing other methods of procurement, the Commission should agree on the principle enshrined in it - namely, that a procuring entity should normally employ tendering proceedings. Any difficulties which delegations had in that respect should be resolved at the outset.

62. Mr. WALLACE (United States of America) suggested that the Commission first discuss chapter II in its entirety, paragraph by paragraph. It could then approve articles 13, 14, 15 and 16 in the light of proposed drafting changes.

63. Mr. TUVAYANOND (Thailand) welcomed that suggestion.

64. Mr. LEVY (Canada) said that the entire Model Law rested on the principle that tendering was the preferred method of procurement. That principle should be endorsed before consideration was given to exceptions and to problems. He therefore felt it would be undesirable to leave paragraph (13) (1) in abeyance.

65. Mr. PEREZNIETO CASTRO (Mexico), referring to the remarks of the representative of Thailand, recalled that subparagraph (2) (a) of article 1 provided for the exemption of procurement involving national security or national defence from the scope of application of laws based on the Model Law. Moreover, subparagraph (2) (b) enabled enacting States to specify other types of procurement to be excluded. Hence there was no limitation of the freedom of Governments.

66. Mr. TUVAYANOND (Thailand) said he had no intention of undermining the principle that tendering proceedings were the best method of procurement. He merely wished to reserve his position in respect of paragraph (13) (1) until he could be sure that its wording would be compatible with national interests.

67. The CHAIRMAN proposed that the Commission approve article 13 in principle. In the course of its examination of articles 13 to 42, it might wish to return to previous articles in chapter II and consider proposed amendments to them.

68. It was so decided.

Article 14

69. Mr. SAHAYDACHNY (Secretariat), introducing the amendment to the chapeau of subparagraph (1) (a) proposed in document A/CN.9/377, said that, even if the procuring entity was able to formulate detailed specifications, the nature of the goods and uncertainty about the specifications might prompt it to use one of the methods of procurement referred to in article 14 other than tendering proceedings.

70. Mr. WALLACE (United States of America) said the Secretariat's proposal touched on an issue that had been hotly contested in the Working Group, which had given precedence to formal competitive bidding in article 13 (1) and where there had been opposition even to the mention of competitive negotiation in the Model Law.

71. In his view, the expression "unable to formulate" was objective, whereas "prefer not to formulate" was not. Moreover, the latter phrase would make it easier for Governments to delay giving specifications and then to opt for competitive negotiation or two-stage tendering. The words "unable to" should be retained, or at least language more careful than "prefer not to" chosen.

72. Mr. JAMES (United Kingdom) said that, for the reasons stated by the representative of the United States of America, he was not in favour of the amendment proposed by the Secretariat. He endorsed the principle, expressed in article 13 (1), that tendering proceedings were the best method of procurement. There were exceptions, but they should be rigorously circumscribed.

73. Mr. LEVY (Canada) expressed surprise at the fact that the Secretariat had proposed such an amendment.

74. The CHAIRMAN said that the Secretariat had decided to withdraw its proposal.

75. Mr. TUVAYANOND (Thailand) said that, although the Secretariat had withdrawn its proposal regarding subparagraph (1) (a), he would suggest that the chapeau be amended to read "for the procuring entity the formulation of detailed specifications is not feasible"; in some cases, what was possible might not be feasible.

76. Mr. JAMES (United Kingdom), welcoming the suggestion made by the representative of Thailand, said the concept of "feasibility" lay between "inability" and "free choice". The matter could be brought to the attention of the drafting group.

77. Mr. PEREZNIETO CASTRO (Mexico), expressing preference for the phrase "is unable to", said that the procuring entity was not being given carte blanche; paragraph (2) of article 13 required a statement of the grounds and circumstances - for example, its inability to formulate the necessary detailed specifications - justifying the use of a method of procurement other than tendering procedures.

78. Mr. SAHAYDACHNY (Secretariat) introduced the amendment to subparagraph (1) (a) (ii) proposed in document A/CN.9/377.

79. Mr. JAMES (United Kingdom) said that, in his opinion, the proposed amendment did not merely represent a drafting improvement; it actually changed the meaning of the present text. The present wording provided for the situation where the procuring entity did not know how to solve a problem and felt it necessary to approach a supplier for advice; such a situation called for a two-way relationship from the very beginning because of the technical nature of the goods - such as computer software - or construction, not because the specifications could not be established with sufficient precision.

80. Mr. ANDERSEN (Denmark), recalling that the United Kingdom representative had mentioned computer software, said that in the case of standard software the specifications would be available and there would accordingly be nothing to negotiate about. Specialized software was a different matter; it lay outside the scope of application of the Model Law.

81. Mr. WALLACE (United States of America) said that, given the changes that were likely to be made to the chapeau of subparagraph (1) (a), the proposal made by the Secretariat regarding subparagraph (1) (a) (ii) was largely redundant. At the same time, he was not convinced that subparagraph (1) (a) (ii) should be retained in its present formulation.

82. Ms. PIAGGI-VANOSSI (Argentina) said that in article 14 there should be provision for pointing out and correcting technical and legal errors in the solicitation documents and in the contract. For example, a procuring entity might be seeking equipment that was obsolete or technically inappropriate. The tenderer drawing attention to such an error should not be allowed to enjoy a special advantage; the other tenderers should be informed of it so as to ensure equal treatment for all.

83. The CHAIRMAN, noting that the concerns raised by the representative of Argentina appeared to be dealt with in article 23, said that the Secretariat had decided to withdraw its proposal relating to subparagraph (1) (a) (ii) and that he took it that the Commission wished to adopt that subparagraph as it stood.

84. It was so decided.

The meeting rose at 5 p.m.